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In the
Supreme Court of the United States

OCTOBER TERM, 1987

HUBERT PARK BECK, DOROTHY FAHS BECK,
ROBERT J. BECK and OTTO WEINMANN,

Petitioners,

vs.

MANUFACTURERS HANOVER TRUST COMPANY;
MILBANK, TWEED, HADLEY & McCLOY;
KELLEY DRYE & WARREN; DONALD B. HERTERICH;
ISAAC SHAPIRO; and EDWARD ROBERTS, III,

Respondents.

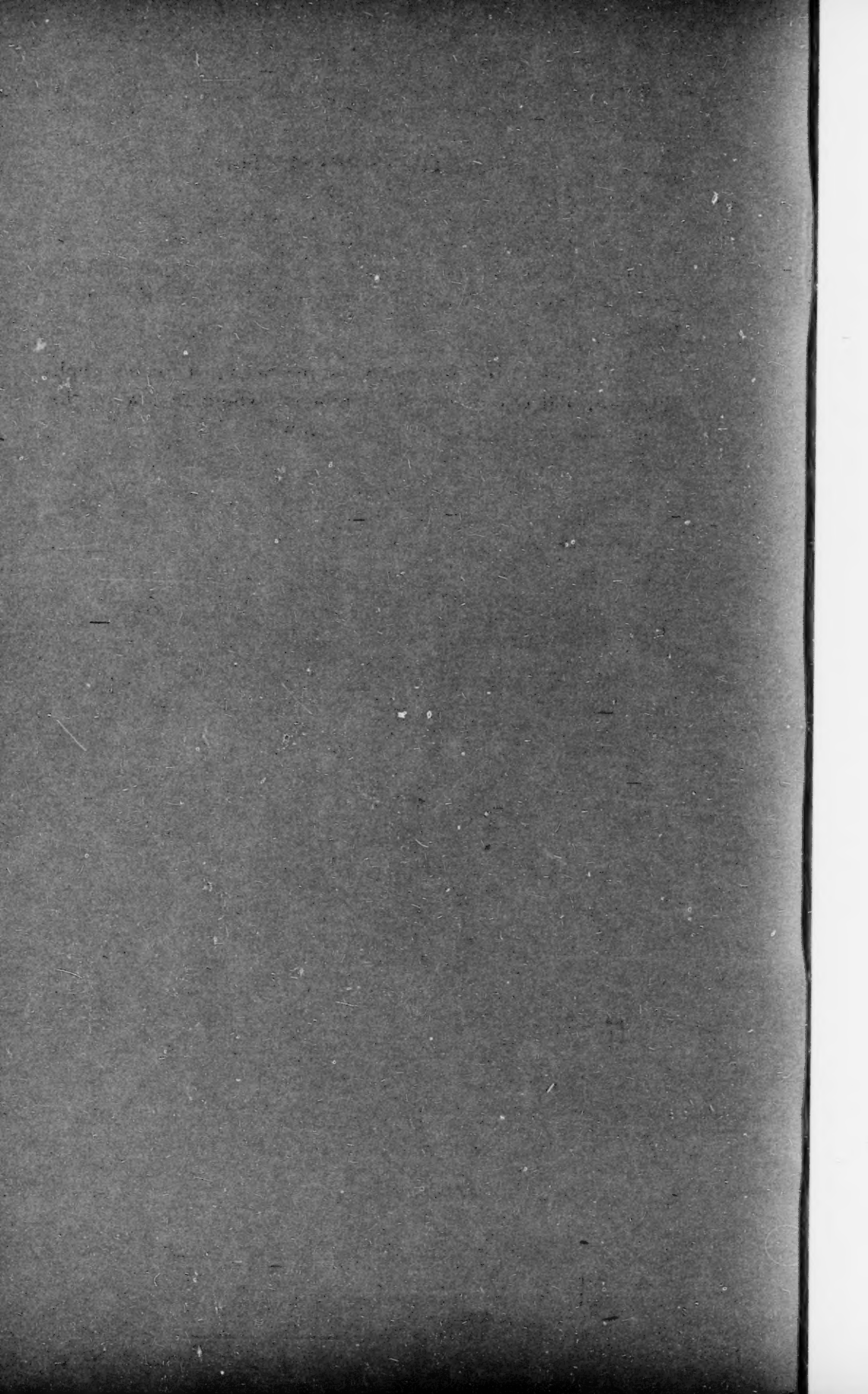
**OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

(1) Should this Court review the Second Circuit's unexceptional application of *United States v. Turkette* in concluding that an alleged association with one straightforward, short-lived goal lacks sufficient continuity to be a RICO enterprise?

(2) Should this Court review the Second Circuit's application of RICO's pattern requirement, where review of this issue could not change the result below?

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STATEMENT OF THE CASE

This action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (1984), is petitioners' third lawsuit alleging substantially the same factual claims. The first two were brought in the New York state court under the caption *Beck, et al. v. Manufacturers Hanover Trust Company*, Nos. 12896/83 and 15145/85 (Sup. Ct. N.Y. Co.) and are still pending. The facts, set forth in the District and Circuit Court opinions (1A and 27A),¹ may be summarized.

Petitioners held \$1,500 and \$150,500 principal amount of two series of bonds issued in 1902 by a Utah corporation which operated railway properties primarily located in Mexico. In 1908 the assets and liabilities of the Utah corporation were taken over by Ferrocarriles Nacionales de Mexico, which operated Mexico's railroads. Both bond issues have been in default since 1914. Over the years the Government of Mexico acquired approximately 96% of both bond issues, leaving less than 5% of the bonds (referred to as "non-assenting" bonds) in the hands of members of the public such as the petitioners.

Respondent Manufacturers Hanover Trust Company ("Manufacturers") is the successor trustee for both bond issues. As trustee Manufacturers held certain railway properties and related assets located in the United States and therefore not subject to the 1908 takeover by Ferrocarriles. This property, referred to as the "U.S. collateral", generated a small amount of income which was paid out to holders of the bonds in a series of distributions between 1942 and December 1981, seven of which were made after petitioners acquired their bonds.

The bond indentures permitted holders of 75% or more of the bonds to direct the trustee to liquidate the collateral. In accordance with this provision and the instruction of the Mexican Government, Manufacturers sold the U.S. collateral in a public auction in December 1982 pursuant to a widely published notice which stated that the minimum price that

¹ References are to the Appendices to the Petition and Petitioners' Supplemental and Second Supplemental Briefs.

would be accepted at the auction was \$31 million. The indentures also provided that the purchase price at such a sale could be paid by tendering a proportionate face amount of the bonds. The Mexican Government assigned the approximately 96% of the bonds which it owned to a company called Mexrail, Inc., and that corporation, being the only bidder, purchased the U.S. collateral for the upset price of \$31 million and paid the purchase price by tendering the bonds assigned by the Mexican Government and cash proportionate to the approximately 4% of "non-assenting" bonds. The cash was then distributed by Manufacturers to the non-assenting bondholders, including petitioners.

In the state court actions petitioners assert two basic claims. First, with respect to the seven distributions of income prior to the public auction, petitioners contend that Manufacturers was wrong in treating the Government of Mexico as a holder of the bonds which it held; they argue that the bonds acquired by Mexico should have been treated as redeemed and cancelled, and that 100% of the amounts distributed should have been paid to the holders of the approximately 4% of non-assenting bonds. Second, with respect to the public auction of the U.S. collateral in 1982, petitioners claim (i) that the U.S. collateral was worth far more than \$31 million and should have been sold at a higher price, and (ii) that 100% of the proceeds of the sale should have been distributed in cash to the holders of the approximately 4% of the non-assenting bonds.

None of the claims in the state court actions is based on fraud. Petitioners allege breach of fiduciary duty and negligence, and there is no allegation of any sort of fraud or deception.

Factually, the RICO claims in this action are virtually identical to the state court claims. The state court claim with respect to the seven interim distributions is alleged in this action as "Phase I"; the state claims with respect to the sale of the U.S. collateral are realleged here as "Phase II". Aside from a welter of technical RICO allegations, the only substantive difference is that in the federal complaint petitioners have changed their tort

theory from breach of fiduciary duty to fraud by repeatedly using the words "fraudulent" or "fraudulently", but without alleging a single fact demonstrating that Manufacturers committed any misrepresentation, false or misleading statement, material omission or other deceptive act evidencing fraud.

— The only other substantive difference between the state and federal complaints is the addition of a "Phase III", which alleges that the Government and people of Mexico were somehow defrauded with respect to the public auction. Petitioners do not represent or act as ombudsmen for the Mexican Government or people. They have no standing to maintain the Phase III claim and the federal courts have no jurisdiction to entertain it.

REASONS FOR DENYING THE WRIT

I. This case is inappropriate for Supreme Court review because it does not involve any clearly definable criminal conduct.

Before turning to the alleged conflicts between the circuits, it should be observed that this action presents an unlikely vehicle for this Court to clarify the statutory terms "pattern of racketeering activity" and "enterprise", because the amended complaint does not allege any racketeering activity. There is no clearly identifiable allegation of any predicate act constituting criminal conduct by any of the defendants. This is evident from the treatment of the fraud question by the District and Circuit Courts.

The District Court dismissed petitioners' fraud claims as to all three phases for failure to comply with Fed. R. Civ. P. 9(b) (13A), in that petitioners —

have not stated facts that support their claim that defendants' acts, in essence alleged breaches of fiduciary duty, were done with the requisite scienter The facts alleged point to a breach of fiduciary duty rather than fraud. (15A)

The Second Circuit agreed with the District Court's dismissal of Phase I for failure to plead scienter (34A), but held as to Phases II and III, that "plaintiffs have adequately pled scienter" having alleged "two sets of unusual circumstances surrounding the sale of the U.S. collateral that give rise to a strong inference of scienter" (34A). But the alleged presence of these two "sets of unusual circumstances" hardly provides a paradigm case of fraud for review.

As stated repeatedly by this Court and in the legislative history, RICO is a criminal statute designed to strike at the economic roots of organized crime. Essential to any criminal or civil charge based on RICO is an allegation that the defendants engaged in two or more predicate acts of "racketeering activity" as defined in section 1961(1). The alleged "racketeering activity" here is mail and wire fraud. But neither of the lower courts was able to identify any comprehensible factual allegation of fraud in the amended complaint, because petitioners' claims, in reality, are based on breach of fiduciary duty.

If the evolving interpretations of "pattern" and "enterprise" merit reexamination at this time, this case is not an appropriate vehicle for such a review because it does not involve any discernible criminal conduct. The precedential value of a decision analysing "pattern of racketeering activity" must be clouded, at best, in a case where no one can define what the "racketeering activity" is. If the concepts of "pattern" and "enterprise" are to be reevaluated in light of the decisions subsequent to *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), it is respectfully submitted that such analysis should proceed in the context of clearly articulated allegations of racketeering activity, rather than in a factual context involving the administration of a trust where no criminal conduct is readily apparent.

II. The alleged conflict among the circuits on "pattern" does not merit review at this time, or in this case.

Petitioners' claims of conflict among the circuits and portents of chaos respecting the "pattern" requirement are

highly exaggerated. The circuit courts are in agreement on the "relatedness and continuity" test for pattern discussed by this Court in footnote 14 of *Sedima*. Moreover, in determining whether a pattern exists the courts all apply the same set of factors mentioned in *Sedima* — the number of participants, the number of victims, methods of commission, purposes of the conduct, extent of the results and injuries and the inter-relationship between the predicate acts.²

Petitioners suggest two areas of divergence. The first is whether a RICO pattern requires more than one scheme. The circuits, with the exception of the Eighth Circuit, uniformly hold that it does not.³ The Eighth Circuit alone requires that the predicate acts be committed in the course of multiple schemes in order for a pattern of racketeering activity to be alleged. However, in the most recent Eighth Circuit decision, *H.J. Inc. v. Northwestern Bell Telephone Co.*, 829 F.2d 648 (8th Cir. 1987) (reproduced at 123A), two judges indicated that the "multiple schemes" rule should be reexamined by that Court *en banc*, stating:

The Second and Seventh Circuits, and now the Ninth Circuit, as well as numerous district courts and a respected scholar in this field, have criticized our position.

² Insofar as the Second Circuit takes a more liberal view of pattern, of course, petitioners have been the beneficiary of that view below.

³ See *Roeder v. Alpha Industries, Inc.*, 814 F.2d 22, 31 (1st Cir. 1987); *United States v. Ianniello*, 808 F.2d 184, 192 (2d Cir. 1986); *Barticheck v. Fidelity Union Bank/First National*, 832 F.2d 36 (3d Cir. 1987); *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987); *R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *Morgan v. Bank of Waukegan*, 804 F.2d 970, 975 (7th Cir. 1986); *Sun Savings & Loan Association v. Dierdorff*, 825 F.2d 187, 193 (9th Cir. 1987); *Torwest DBC, Inc. v. Dick*, 810 F.2d 925, 929 (10th Cir. 1987) (declining to formulate a bright-line test, but not ruling out that a single scheme may constitute a pattern); *accord, Condict v. Condict*, 815 F.2d 579, 584-85 (10th Cir. 1987); *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986).

I believe, as stated in my separate concurrence in *Henning*, that when a proper case arises the multiple scheme requirement should be examined by the court en banc (127A-128A).

Thus, it appears that the circuits are moving towards uniformity on their own, and intervention by this Court at this time is unnecessary and premature.

Petitioners also argue that “whether a single-purpose scheme must be open-ended to constitute a ‘pattern’ has recently been considered by the Third, Fourth and Tenth Circuits, with totally irreconcilable results” (Second Supp. Brief 4). But the three circuit court decisions cited by petitioners (reproduced at 138A, 144A and 154A) provide no evidence of a real conflict even on this issue. The Third Circuit in *Barticheck v. Fidelity Union Bank/First National State*, 832 F.2d 36 (3d Cir. 1987), expressly rejected “the view that racketeering acts committed pursuant to a single scheme can constitute a RICO pattern only if the scheme is potentially ongoing or open-ended” (162A). No conflicting statement of law appears in either the Fourth or Tenth Circuit opinions cited by petitioners. Both Circuits have stated that they have not formulated a hard and fast test for determining a RICO pattern (141A, 151A) and have only stated that “discreet” or “limited” schemes do not constitute a “pattern”. This is entirely harmonious with the Third Circuit’s approach, which focuses on the “extent” of the racketeering activity and likewise eschews a general formulation in favor of an inquiry into continuity and relationship based on the facts of each case (162A).

In short, the law on the “pattern” requirement is evolving as the circuit courts seek to apply the precepts articulated in *Sedimā* footnote 14 to the facts of particular cases. Analysis of the decisions reveals that apparent differences often are more a

matter of nomenclature than substance,⁴ and to the extent that there is a real dichotomy reflected in the Eighth Circuit's multiple schemes rule, at least two judges on that court are prepared to reconsider the issue *en banc* in an appropriate case. Certiorari has been denied in the past to permit "further study" in the lower courts. *McCray v. New York*, 461 U.S. 961, 963 (1983).

Certiorari is also inappropriate in a case, such as this, where resolution of a conflict between the circuits could not change the result reached below. See *Sommerville v. United States*, 376 U.S. 909 (1964). Petitioners prevailed below on the pattern requirement, and they do not stand to gain anything by further review of that issue. In short, petitioners have no standing to complain about a conflict in the circuits on the issue of pattern, because they were not harmed by that conflict below.

If this Court viewed the Eighth Circuit's "multiple schemes" rule as meriting review at this time, surely the Court would have granted certiorari in *Madden v. Gluck*, 815 F.2d 1163 (8th Cir.), *cert. denied*, 108 S. Ct. 86 (1987) where the Eighth Circuit reaffirmed its multiple schemes position on the pattern requirement. But certiorari was denied in *Madden v. Gluck* on October 6, 1987.⁵

⁴ For example, the criminal activities in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986) involving skimming profits from several different restaurants and bars owned by different corporate entities, which the Second Circuit characterized as a single "scheme", might well have been regarded by another court as "multiple schemes". Regardless of the characterization, the facts clearly met the "continuity" test, and the result would be the same in any circuit. As the Second Circuit said in *Beck*, citing *Ianniello*: "whether one looks for the requisite continuity and relatedness by examining the pattern or the enterprise is really a matter of form, not substance" (37A).

⁵ In light of this denial, petitioners appear to have abandoned their theory that any potential conflict with the Eighth Circuit decision on pattern provides a basis for review, instead reformulating the question to be whether the Second Circuit's enterprise holding "comports with the statutory definition of 'enterprise' in § 1961(4), and is within the ambit of footnote 14" (Supp. Brief 2).

III. The Second Circuit ruling on “enterprise” does not conflict with other circuits, *Sedima* or the statute.

Petitioners complain that “the rules of the Second and Fifth Circuits, in which ‘pattern’ litigation has segued into ‘pattern/enterprise’ litigation are grossly violative of the RICO statute and substantially transcend the possible limits of any mandate on the interpretation of ‘pattern’ suggested by this Court in [*Sedima*] footnote 14” (Petition 7).

Before turning to petitioners’ substantive contentions on “enterprise”, two preliminary points should be made. First, there is no conflict among the circuits on the interpretation of “enterprise”. Petitioners repeatedly acknowledge (Petition 7, 15; Second Supp. Brief 2, 4, 6) that the Second and Fifth Circuits have taken the same approach on the enterprise question, and no circuit has expressed a conflicting view. Second, petitioners’ frequent references to “pattern/enterprise litigation” is misleading, because—pattern and enterprise are separate and different statutory elements and must be treated independently. As this Court said in *United States v. Turkette*, 452 U.S. 576, 583 (1981):

While the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other. The “enterprise” is not the “pattern of racketeering activity”; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

Petitioners’ substantive objection to the Second Circuit’s decision in this case is that the lower court “violated the RICO statute and transcended the limits of footnote 14 of *Sedima* by appending to the concept of ‘enterprise’ *Sedima*’s continuity considerations regarding ‘pattern’” (Petition 15). The argument is without merit.

The Second Circuit’s requirement of continuity as an element of “enterprise” is fully consistent with this Court’s

decision in *United States v. Turkette*, *supra*, where the Court said that enterprise is “proved by evidence of an *on-going organization*, formal or informal, and by evidence that the various associates function as a *continuing unit*” (452 U.S. at 583; emphasis supplied). There is no inconsistency whatever between the requirement of continuity for an enterprise, recognized in *Turkette* and in the decisions of the Second and Fifth Circuits, and the requirement of continuity in pattern, recognized in *Sedima* footnote 14 and in all of the decisions following *Sedima*.

Other circuits have reached similar holdings on the requirement of continuity for an enterprise. *See, e.g., United States v. Neapolitan*, 791 F.2d 489, 499-500 (7th Cir.), *cert. denied*, 107 S. Ct. 422 (1986) (following *Turkette*, the enterprise must be a distinct entity with a structure which is more than a group of people who get together to commit a pattern of racketeering activity); *United States v. Bledsoe*, 674 F.2d 647, 660-67 (8th Cir.), *cert. denied sub nom. Phillips v. United States*, 459 U.S. 1040 (1982) (holding that it is fundamental that the enterprise function as a continuing unit, requiring some continuity of structure and personnel); *United States v. Lemm*, 680 F.2d 1193, 1201 (8th Cir. 1982), *cert. denied*, 459 U.S. 1110 (1983) (sporadic and temporary criminal alliance to commit RICO crimes not sufficient to constitute an enterprise); *United States v. Riccobene*, 709 F.2d 214, 221-24 (3d Cir.), *cert. denied sub nom. Ciancaglini v. United States*, 464 U.S. 849 (1983) (ongoing organization required); *United States v. Zang*, 703 F.2d 1186, 1193-94 (10th Cir. 1982), *cert. denied sub nom. Porter v. United States*, 464 U.S. 828 (1983) (same).

The legislative history of RICO reveals that the continuity and relationship tests are not solely confined to the pattern requirement, and are integral to the enterprise requirement. For example, Rep. Poff's comment, quoted in *Sedima*, that RICO “is not aimed at the isolated offender” is addressed to the entire RICO statute, not just to the pattern requirement. 116 Cong. Rec. 35,193 (1970). Senator McClellan, one of the bill's sponsors, made clear that the prime focus of the bill was

enterprises with a coherent structure, *i.e.*, “organized crime groups”, with defined “internal organization[s]” including “chieftains” and a “leadership structure” akin to a “private government”. He said that the groups’ operating methods had evolved “during several decades” of this century. 116 Cong. Rec. 585-86 (1970). Senator Hruska, the bill’s co-sponsor, confirmed that “racket enterprises” were closely akin to the major organized crime families. *Id.* at 601. He stated that their actions are “the result of intricate conspiracies carried on over many years”. *Id.* Likewise, Senator Scott stated that the bill was aimed at “syndicated crime” — which “involves thousands of criminals in structures as complex and large as any corporation with laws rigidly enforced through terror . . . [i]ts operations are national and international.” *Id.* at 819. *See also id.* at 844. Throughout the debate, the legislators used “enterprise” to mean an organized structure such as a business. 116 Cong. Rec. 35,196-97 (1970). *See also id.* at 35,199, 35,201; Senate Report at 78-82.

The existing policy of the United States Attorney’s Office also has incorporated considerations of continuity into the enterprise requirement. The United States Attorney’s Manual instructs:

No RICO count of an indictment shall charge the enterprise as a group associated in fact, unless the association-in-fact has an ascertainable structure which exists for the purpose of maintaining operations directed toward an economic goal, that has an existence that can be defined apart from the commission of the predicate acts constituting the patterns of racketeering activity.

United States Attorney’s Manual, Title 9—Criminal Division, Guideline No. 9-110.360. *See Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 427 n.1 (5th Cir. 1987).

In their Second Supplemental Brief, having revised their statement of the grounds on which certiorari should be granted for the third time, petitioners now seek summary reversal under Supreme Court Rule 23.1. No basis exists on the record of this

case for such an extraordinary measure. Nor do petitioners, apart from their bald assertion that the decision of the Second Circuit is “judicial interpretation run amok” (Second Supp. Brief 4) offer a single credible ground upon which such a request could be granted.

Petitioners’ contention that the group of law firms, individuals and a bank in this case whose common activity related to the public auction of certain trust assets — “one straightforward, short-lived goal” (37A) — constituted an “enterprise” finds no support in logic, the statute or the case law. The holdings of this Court in *Turkette* and of the Second Circuit and other circuits in numerous decisions all demonstrate that the element of continuity is essential to the statutory term “enterprise”.

Finally, since petitioners attribute the Second Circuit’s error of “engrafting” pattern considerations into the concept of enterprise to the decision in *United States v. Ianniello*, 808 F.2d 184 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 3230 (1987), one might consider that case a more appropriate candidate for review by this Court than *Beck*. But this Court denied certiorari in *Ianniello*.

IV. There are currently pending before Congress amendments to RICO which would render moot any conflict on the pattern requirement.

The proposed amendment to the RICO statute’s definition of pattern currently before Congress (H.R. 3240),⁶ the most

⁶ The text of the amended definition of pattern proposed in H.R. 3240 is as follows:

Sec. 3-DEFINITION OF PATTERN.

Paragraph (6) of section 1961 of title 18, United States Code, as redesignated by section 2(b) of this Act, is amended to read as follows:

“(6) ‘pattern’ means at least two acts of racketeering activity or fraudulent activity, or both, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity or fraudulent activity, or both, that are—

recent in a series of legislative proposals since this Court's decision in *Sedima*, provides an additional basis upon which certiorari should be denied. Even in the face of a square conflict, certiorari is inappropriate where the statute upon which the controversy rests may be amended in a manner which will prevent the problem from arising in future cases. *United States v. Abrams*, 344 U.S. 855 (1952); *Community Services, Inc. v. United States*, 342 U.S. 932 (1952); *Sokol Bros. Furniture Co. v. Commissioner*, 340 U.S. 952 (1951); *United States v. Beal*, 340 U.S. 852 (1950); *United States v. Wilkinson*, 355 U.S. 839 (1957); *United States Rubber Co. v. Commissioner*, 274 F.2d 307 (2d Cir.), *cert. denied*, 363 U.S. 827 (1960).

“(A) under subsection 1962(c) of this chapter, related to the affairs of an enterprise;

“(B) not isolated, but they need not be part of a common scheme or plan; and

“(C) except under section 1962(b) of this chapter, not so closely related to each other and connected in point of time and place that the acts constitute a single episode involving only one victim so that they do not in themselves, in light of the purpose for which they were committed, with reference to the enterprise, or otherwise, give rise to an inference of the possibility of continuity of activity;”.

CONCLUSION

The Second Circuit's decision in this case presents no issue worthy of review by this Court. Accordingly, respondents respectfully request this Court to deny the petition for a writ of certiorari.

Dated: December 11, 1987

Respectfully submitted,

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